# RIGHTS, DUTIES AND RESPONSIBILITIES: THE FOUNDATION OF INTERNAL INVESTIGATIONS

EXECUTIVE DEVELOPMENT

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**ABSTRACT**

Public and private sector organizations are all required, at some point, to investigate and resolve complaints regarding misconduct and other behavioral issues. The success or failure of these efforts will depend on the organization's ability to conduct effective and appropriate internal investigations. Fire departments are often ill-equipped to handle the legal issues involved.

The purpose of this research was to define both the organization's and the employee's rights and responsibilities during the course of an internal investigation. The evaluative research method was chosen to answer the following research questions:

1. What circumstances would require an organization to initiate an investigation?

2. What are an employee's rights in the course of the investigation?

3. What are the employee's obligations in the course of the investigation?

4. Are the results of the internal investigation accessible to the employee?

A literature review was conducted to discover the legal and resulting procedural issues involved. Three courses relating to the subject were attended, and three subject matter experts were interviewed to gain the benefit of their organizational experience and applied knowledge. The author also participated in a number of investigative and background interviews to gain first hand experience.

The findings included a wide range of legal requirements including due process, privacy rights, search and seizure issues, as well as the employee's obligations to respond to investigative requests. The results also defined the organization's obligations to investigate in the areas of Title VII, OSHA, workplace violence, and others.

Recommendations include the need to clearly define procedures in concert with all appropriate legal concerns. Professionalism of investigative staff is stressed, and methods of documentation were also defined. Any policy implemented must combine elements of City policy, negotiated language, and sound legal principles. The importance of recognizing the need for investigations is considered paramount in order to avoid organizational liability.

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## INTRODUCTION

The Las Vegas Fire Department, like any organization, experiences its share of personnel disciplinary issues arising from complaints of misconduct, malfeasance, criminal behavior and other conduct related problems. To date, management's resolution of these problems has often been marked by inconsistent and ineffective disciplinary action with subsequent losses in grievance and/or arbitration proceedings. This has occurred in large part due to the absence of an internal investigation policy to provide procedures for investigating complaints and allegations of wrong doing. In particular, ineffective or inappropriate actions in the early stages of complaint investigation and documentation often sets the stage for failure in supporting subsequent discipline. Without an organizational guideline for investigations well grounded in applicable law, the potential for overturned disciplinary actions remains great. The Department also risks liability if the need to investigate is ignored or done incorrectly.

The purpose of this research is to delineate certain legal and procedural requirements and principles involved in conducting an effective internal investigation. This will help to ensure that individual rights are protected through a thorough understanding of legal issues and sound business principles. This research will also establish guidelines for the eventual development of an internal investigative policy. This study uses an evaluative research methodology. The research questions to be answered are:

1. What circumstances would require an organization to initiate an investigation?
2. What are an employee's personal rights in the course of the investigation?
3. What are the employee's obligations in the course of the investigation?
4. Are the results of the internal investigation accessible to the employee?

**BACKGROUND AND SIGNIFICANCE**

There is an obvious need in any organization for order and discipline. This is required in order for any group to function effectively, promote teamwork, and protect individual rights and safety. In light of today's legal requirements and resultant high dollar awards to aggrieved employees, this need becomes a business necessity as well as a moral, practical, or ethical imperative. In the context of a public service organization like the Fire Service, this also becomes an issue related to image and public expectations.

The Las Vegas Fire Department enjoys an excellent reputation as a progressive and professional fire department, and we pride ourselves on our abilities in suppressing all manner of emergencies in the field. Sadly, that professionalism does not translate into top performance in the realm of legal and technical issues surrounding the investigation of misconduct and internal or external complaints. The Department has had a mixed history in successfully dealing with some of these disciplinary issues. Our efforts have been marked by mistakes made in investigative efforts, documentation, and successful administration of discipline.

The Department first addressed this issue by institutionalizing a progressive discipline process in 1983. The program was effective at systematizing a performance tracking process, and establishing graduated disciplinary steps for most common infractions in performance, conduct, and attendance. This did not, however, address the need for professional and effective investigative protocols, nor did it recognize the need to document internal investigations, clearly vital in the arena of civil rights and sexual harassment. The first recorded attempts to rectify this lack of protocols occurred in 1986, when (then) Deputy Chief Rex Shelburne submitted a document entitled "Administrative Investigation and Review Procedures" to the Las Vegas City Attorney's office for review. This document was summarily

reviewed, with a report regarding effectiveness of the procedure and the legality of the underlying premise for an employer investigation. Apparently, the effort to finalize the procedures went no further.

The lack of procedures for internal investigations has had a negative impact on the Department. The most obvious is the resultant inconsistencies in procedures ( and outcomes) in efforts to maintain order and efficient operations through discipline. The direct effect has been that all too often, discipline is imposed, then overturned in the grievance process or in arbitration. This has a negative impact on morale, especially in the ranks of Officers who make every effort to do what they see as right, only to have to deal with the aftermath of having their disciplinary decisions overturned. There is an indirect effect on the organization as a whole, with the professionalism of management (perhaps rightly) being called into question. For the rank and file, the current process is viewed as capricious, inconsistent and sloppy.

In the past few years, investigation of complaints and off-duty activities proscribed by law or regulation have been handled in a number of ways. When arrests are made of Department personnel, the services of the Las Vegas Metropolitan Police have been used. In other instances, personnel from the City's Human Resources Department have handled investigations (particularly in areas relating to Title VII). We have also been assisted by investigators attached to the City Attorney's Office. While the assistance of the above-named resources is typically professional and effective, it is an inconsistent approach to what is clearly an important organizational need, one which a "Class 1" Department should be capable of handling. The need to develop an Internal Investigative policy has been formalized recently, as the Deputy City Manager has ordered the Fire Chief to appoint an Internal Investigator and to develop an Internal Investigative Policy.

The relevance of this research to the Executive Development course directly links to issues discussed in the studies of legal aspects of the Fire Service. The issues relate to liability, discipline and ethical concerns for both the agency and its personnel.

## LITERATURE REVIEW

The literature review for this project focused on statutory and case law relevant to individuals' rights and obligations, as well as procedures derived from cases relevant to investigative practices. Clearly, the vast body of law recounted here shows that the employer must take pains to respect individual rights or risk liability in the course of trying to manage the work force.

### DUTY TO INVESTIGATE

There are situations and conditions which impose a duty upon the employer to conduct investigations. Some of these are expressly required, others implied. Still others are done by the prudent employer in order to protect themselves from liability. In all cases, the threshold for making the decision to investigate a particular issue or event is low. Any time the employer has a "good faith" reason to believe that an employee may have violated a law, policy, or rule; action should be taken (Curiale, 1997). Federal, State, and local requirements to conduct investigations are imposed under the following laws or policies, or contract provisions:

### STATUTORY REQUIREMENTS

Title VII of 1964 and 1991, the American with Disabilities Act (1990), and the Age Discrimination in Employment Act (1967), are Federal laws which impose some duty to investigate and take remedial action in a timely manner. Generally stated, these acts were created to protect employees

from harassment on the basis of their race, sex, age, physical or medical condition, or national origin or ancestry.

Sexual harassment complaints often carry the greatest risk of liability for employers. To minimize exposure to liability, it is vital that the employer conduct and document all investigative efforts (How to conduct, 1998). It is the employer's obligation to take prompt and effective remedial action to correct the conditions leading to sexual harassment charges. The costs for trying to ignore, or worse cover up, sexual harassment can be extreme. In a 1994 case involving a large law firm, Rena Weeks sued her former boss, Martin Greenstein for harassing and physically abusive behavior. Colleagues of Mr. Greenstein tried to cover up this and other incidents reported by female employees. The end result? An award for Ms. Weeks in excess of $7 million, including fines for insufficient sexual harassment prevention practices (Moore, 1998).

One of the keywords in the employer's obligations is to take "effective" action. In Intlekofer v. Turnage (1992), Joyce Intlekofer was a Veteran's Administration (VA) employee who was repeatedly harassed by a fellow employee, with whom she had had a prior relationship. The VA counseled the offending employee, gave him verbal warnings and threatened further punishment. The VA also took measures to minimize his contact with Ms. Intlekofer. Unsatisfied with the results of their efforts, Ms. Intlekofer took her Title VII claim to court.

The court ruled that even though the VA made efforts to correct the harassing behavior, it failed in their duty to stop sexual harassment in the workplace. They should have imposed progressively harsher punishment to ensure that the offensive behavior would stop. This would have also sent a strong message to other employees that the VA was serious about its sexual harassment policies (Morgando, 1994).

The Federal Occupational Safety and Health Act (1970) contains language which requires employers to do everything "reasonably necessary" to protect the life, safety and health of its employees. This "general duty" provision carries financial penalties for employers who fail to provide for employee safety. Criminal penalties have also been imposed on supervisors and managers who commit willful violations; acting with indifference to OSHA requirements (Squyres et al., 1996).

Proactive investigative practices and documentation can reduce liability if early investigation of potential safety problems are conducted as soon as they are noticed. In the area of workplace violence, early investigation of personnel problems may lead to the resolution of issues that could lead to potential confrontations. This is an example of an investigative policy and procedural plan reducing the employer's liability, as well as promoting a safer and healthier workplace (How to conduct, 1998).

While not applicable to the Las Vegas Fire Department, the Federal Drug Free Workplace Act (1998) requires agencies that contract with the federal government to provide a drug free workplace. Investigative policy and procedures must be in place in these companies in order to comply with their contract provisions.

On a more local level, the Municipal Code of the City of Las Vegas (1981) contains language concerning investigation of citizen complaints in Title 2; Chapter 2.56. In this code section, the City Attorney reserves the right to conduct investigations into citizen complaints, and may conduct public hearings on the matter . In practice, the investigation of complaints may be performed by City Attorney's Office investigators, but the imposition of discipline is "in-house" and handled at the Department level.

Pre-employment background investigation for the City of Las Vegas is required; the procedures for which are defined in a document entitled "City of Las Vegas Personnel Policies Manual", Chapter

3.04 (1998). This policy describes the various types of investigative procedures which may be required, depending on the position applied for.

The Las Vegas Fire Department utilizes a progressive disciplinary process, which was developed jointly between Management and Labor. This "Positive Discipline" program features two phases: the "Informal" process; using coaching and counseling to assist the employee in recognizing and correcting problems; and the "Formal" process, which is the administration of discipline. The "Formal" process requires an investigative interview prior to implementing any disciplinary procedures (Las Vegas Fire Department, 1998).

COMMON LAW

Case law has imposed upon the prudent employer a need to protect themselves from liability in the areas of negligent hiring, supervision, and retention. Background investigations and supporting documentation will help to protect the employer by demonstrating a good faith effort to hire appropriately. Sound investigative procedures will also be needed when personnel problems arise with incumbent employees (J Tuttle, personal communication, August 13, 1998).

Employers have been found liable for the acts of employees who harm others under the theories of negligence. Negligent hiring refers to the employers failure to adequately investigate the background of potential employees before they're hired. Negligent retention or negligent supervision occurs when an employee poses some kind of risk to others, and the employer fails to take action to discharge or otherwise control that employee. A thorough background investigation policy should be in place and such procedures should be followed, prior to employment (Preventing an employer's nightmare, 1997).

In any investigation, the choice of an investigator is critical, especially in the area of pre-employment screening (Doran, 1996). Rosetti (1998, p.1) agrees, stating that "The integrity of the

investigation (or prosecution) can be compromised if the investigative staff is not adequately trained, prepared, or equipped to handle the …investigation". He also comments on the negative effect on morale that occurs when the investigation is perceived to be haphazard or unprofessional. Our Department makes use of both Human Resource experts as well as a police investigator for this process.

As noted in the discussion of Title VII and the reference to Intlekofer v. Turnage; the employer's obligation to investigate activities in the workplace create the potential for liability. In Watts v. New York City Police Department (1989), the court stated that an employer "has an obligation to investigate whether acts conducive to the creation of an atmosphere of hostility did in fact occur and, if so, the employer must attempt to dispel workplace hostility by taking prompt remedial steps" (Hogan, 1995, pp.194-195). The International Association of Police Chiefs recognizes the importance of this obligation, stating that a formal procedure for investigating complaints provides a "safety valve" against lawsuits (Fitzwilliam, 1997).

EMPLOYEE RIGHTS

The 14th Amendment to the United States Constitution has been interpreted to apply to decisions affecting public employees disciplinary procedures. In Section 1, the amendment states in part: "…nor shall any state deprive any person of life, liberty, or property, without due process of the law, nor deny to any person within its jurisdiction the equal protection of its laws" (1787). This application of "due process" in the course of discipline means that certain procedural safeguards be provided before termination. Those safeguards include:

1. Notice of charges brought against an individual;
2. An opportunity to respond to those charges prior to dismissal;

3. Provided with sufficient time to prepare a defense;
4. Inclusion of at least one charge recognized as grounds for termination, if termination is anticipated. (Disciplinary action, 1997).

While a discussion of due process may seem more germane to the disciplinary process than investigations, the use of the formal investigative interview serves to satisfy the requirements noted above. Therefore, as one of the more significant employee rights, it's inclusion here is important. This is also an area where procedural missteps have plagued our Department and hampered our own disciplinary efforts in the past.

The right to due process is not automatically guaranteed for all employees. Two Supreme Court cases from 1972 have defined the applicability of due process for employees in the public sector. These decisions state that liberty and property interests in employment are created by contract or state law, and protected by the Constitution. In other words, "at will" employees typically have no property interest in their job, therefore they have no expectation of, or right to, due process in the course of their termination. The "at will" issue was settled in Board of Regents v. Roth (1972), in which case the Court denied property interest and due process to a non-tenured Wisconsin State University professor. The obverse was defined the same year in Perry v. Sindermann (1972). In this case a non tenured professor was employed for 4 years. The court found that regardless of tenure, a mutual understanding of continued employment existed. Therefore, the professor had a property interest in his job, and a hearing was required before the University could discontinue his employment (United States Supreme Court Employment Cases, 1997).

Several Court of Appeals decisions have upheld these principles in employment law. To cite two more recent examples, in Border v. City of Crystal Lake (1996), the lack of a clear promise of

continued employment negated any property interests in employment. And, in Blanding v. Pennsylvania State Police (1993), it was ruled that probationary employees generally do not hold a property interest in their job (Disciplinary action, 1997).

Where due process applies, it must be fair, timely, and must provide the employee with an opportunity to respond to the charges against them. The pre-eminent case dealing with timeliness in the pre-termination hearing is Cleveland Board of Education v. Loudermill (1985). In this case (actually the combination of two individual's claims against the Board), the Court ruled that these employees were vested of a property interest in their jobs, and were therefore entitled to an opportunity to respond to charges against them in a timely manner. This pre-termination hearing does not have to resolve the validity of the charges, but should serve as a check against mistaken assumptions (US Supreme Court Employment Cases, 1997).

A recent local case dealt with this due process issue. In Trojan v. Clark County (1995); several workers at the county hospital were investigated in connection with drug related charges. After an investigative interview in which the pending charges were disclosed, the workers were suspended without pay, in accordance with conditions in the Collective Bargaining Agreement. The workers were given a pre-termination hearing, were terminated, and were also given post-termination hearings. They sued, claiming that their due process rights were violated by being suspended without due process. The court ruled against the workers, finding that the interview prior to the suspension provided adequate due process. In other words, as long as the employee is advised of the allegations, shown the evidence, and provided an opportunity to explain, the due process requirement has been met (Fired county employees, 1995).

Good faith on the part of the employer should be inherent in this process. In Wagner v. City of Memphis (1997), a white police Lieutenant was charged with violating departmental regulations in an altercation with two black undercover policemen. The officer conducting the pre-termination hearing was pressured by the Mayor to fire the Lieutenant, because of demands from the black community. When the Lieutenant was subsequently fired, he sued in U.S. District court, alleging violations of due process rights, as well as his rights to equal protection under federal law. The Lieutenant prevailed in his suit, as the so called hearing was not held in good faith, and he had credible evidence of racial discrimination (Racially motivated discharge, 1998).

Local procedures in regards to due process are spelled out in the Civil Service Rules of the City of Las Vegas (1992). Chapter VI; Section 4.d states:

> Notification: an employee shall be notified in writing of any disciplinary action that could lead to suspension, demotion, withholding of merit increase, or termination, and shall be afforded the opportunity to meet with the Department Director (or Deputy Director) to discuss the proposed disciplinary action prior to the action being taken. An employee may also respond to the proposed disciplinary action in writing.

The Collective Bargaining Agreement between the City of Las Vegas and Local 1285 of the International Association of Firefighters (1997) was recently amended to specifically exclude probationary employees from grievance procedure protection in regard to termination. This is a direct reflection of the Court's stance on non-tenured employee's lack of property interest and the need for due process. In this instance, the Local recognizes the business necessity for a probationary period to evaluate the fitness of potential firefighters, and has agreed to not defend the probationary employee in non-confirmation; as long as the actions taken are consistent with applicable state or federal law.

PRIVACY RIGHTS: SEARCH & SEIZURE

The 4th Amendment to the United States Constitution ensures that Americans are free from unreasonable search and seizure by government agents. This right is more strictly enforced in criminal law than in the realm of public employment. As defined in O'Connor v. Ortega (1987), the Court uses a balancing of interests approach. At issue are the public employers' need to manage a safe and efficient workplace environment and assure public accountability, versus the employee's reasonable expectation of privacy.

The case involved a California state hospital psychiatrist who had occupied the same office over a span of seventeen years. His office was not in a public area, and given his tenure, he certainly had some expectation of privacy. However, the state had reasonable suspicions of wrong-doing, searched his office several times in the course of their investigation, resulting in the seizure of items within the office. The doctor ultimately sued for violation of his fourth amendment rights. In deciding this case, the court weighed the individual expectation of privacy against the employers' interest in managing an efficient work place. The court refused to impose the probable cause standard, or to require a search warrant as is required in criminal law. They instead imposed a "reasonableness" standard, and found that, in this case, the employers' needs outweighed the individuals expectations of privacy (United States Supreme Court Employment Cases, 1997).

This was further upheld in Gossmeyer v. McDonald (1997). Gossmeyer was an investigator with the Illinois Department of Children and Family Services. An informant within the workplace notified management that Gossmeyer had pornographic photos of children in a locked file cabinet (which she owned) in her office. A management representative forcibly entered the file cabinet and searched its contents.

The search did not reveal incriminating evidence of any sort. She then sued, citing violations of her fourth amendment rights to unreasonable search and seizure.

The court looked at two issues: was the search justified in its inception; and was it reasonably related in scope to the information prompting the search. Based on these standards, the search was deemed reasonable. The informant's tip was considered reliable, and the search was limited to the areas where the material in question was likely to be stored (Search of, 1998). Moss-Hunsaker (1995) state that liability may be avoided if a clear written policy is developed and disseminated throughout the organization: This policy should outline the circumstances under which searches may be done, and must be applied in a nondiscriminatory fashion.

The City of Las Vegas has such a policy in place. The Personnel Policies Manual; Section 9.06 (1997), states in part: "The City reserves the right, at all times, and without prior notice, to inspect and search any and all City of Las Vegas property . . . at anytime and in the presence or absence of the employee". This policy also covers computer systems and networks, voice mail and e-mail.

Polygraph exams for Nevada public employees are proscribed by state law; NRS 613.440 to 613.510 (1989). Classified fire employees are also protected from any requirement to submit to polygraphs by contract language in Article 26 of the CBA (1997).

DEFAMATION

Defamation is defined by Hogan (1995, p.325) as "injuring a person's character, fame or reputation, either by writing or orally". Employees have a right to maintain their reputation and good name throughout the course of investigation and termination. Awareness of issues surrounding defamation must be an integral part of developing an investigative policy.

To prevail in a defamation suit, the plaintiff must show that the employer made a false statement of fact, as opposed to a simple opinion. Typically, the plaintiff must prove actual damage to have a valid claim (Demaree, 1995).

According to a Nevada Supreme Court case, a defamatory statement is one that: "would tend to lower the subject in the estimation of the community, excite derogatory opinions about the subject, and hold the subject up to contempt" (Demaree, 1995).

A 1997 Nevada Supreme Court case found that defamatory statements circulated solely within the organization can result in liability. This ruling wipes out twenty years of precedent stating that internal communications that were not published externally were not defamatory (Zucker, 1998).

In a case that proves "actions do speak louder than words", a Minnesota Appellate case ruled defamation can occur by an employers' visible actions. A terminated employee was escorted to his office to collect his belongings, then escorted to the parking lot in full view of other employees. The court ruled that this escort was construed as a false "statement" of the employee's dishonesty, as he could not be trusted to leave the building unescorted (Defaming without speaking, 1995).

UNION REPRESENTATION

Public employees are entitled to union representation during interviews with management, even at the supervisory level. This principle was embodied in the case National Labor Relations Board v. J. Weingarten (1975). As an interpretation of Section 7 of the National Labor Relations Act (1935), the court found that the right to representation in disciplinary interviews is an integral part of the collective bargaining process. It should be noted that the NLRA does not apply to public employees, but the principle has been codified virtually nationwide (Aitcheson, 1997).

Case law also speaks to the right of employees in a unionized workplace to union representation early on in any disciplinary process. Public employees have a right to union representation any time they reasonably believe that discipline may result from an interview. In Ehlers v. Jackson County Sheriffs Merit Commission (1997), an officer was ordered by the Sheriff to participate in an interview. She attended with her union representative, believing that her job was at stake. The Sheriff ordered her to stay and be interviewed and demanded she do so without union representation. She refused and was terminated for insubordination. The court found that the order to be interviewed without representation was an unlawful order; she prevailed and was restored to her job (Officer entitled, 1998)

In City of Reading v. Pennsylvania Labor Relations Board (1997), an appellate court found no difference between requiring a written memo from an employee or a face to face interview when either could lead to discipline. When a Pennsylvania police officer was required to prepare a memo documenting his mishandling of evidence, he requested an opportunity to consult with his union representative. This request was denied. The action was later ruled as an unfair labor practice (Requiring memorandum, 1997).

The City of Las Vegas is permissive in regard to the employee's right to union representation. The Agreement between the City of Las Vegas and IAFF Local 1285 (1997) clearly outlines the employee's representation rights in Article 10; D.9. The Department's Positive Discipline Manual (1998) also stressed the importance of . . "ensuring that the employee has time to secure union representation before any investigative interview takes place."

## PROTECTION FROM INCRIMINATION

Public service employees can be required to cooperate in internal investigations, even if the information solicited may be incriminating. An important U. S. Supreme Court decision, Garrity v. New Jersey (1966), protects employees from having those statements used against them in a criminal prosecution.

In Garrity, police officers forced to cooperate in an investigative interview divulged information which was later used to convict them in a criminal case. The Supreme Court, recognizing that the choice between termination and cooperating in an investigation is an onerous one bordering on coercion ruled that using the information thus obtained in criminal proceedings violated the employees fifth amendment rights. A subsequent case, Garner v. Broderick, (1967) established that an employer cannot compel an employee to waive his Garrity Immunity. It also established that the scope of the investigation must focus narrowly on duty related issues (Aitcheson, 1997).

## EMPLOYEE RESPONSIBILITIES IN INTERNAL INVESTIGATIONS

In the same light, the obvious corollary to the Garrity protection is that an employee has no constitutional right to avoid making a statement in an internal investigation.

Employees of the Las Vegas Fire Department are required to participate in Investigative Interviews (Las Vegas Fire, 1998). This gives the employee an opportunity to respond to charges; the option of preparing a written response is also given.

Department employees are also required to answer truthfully in the course of an investigative interview. A case originating locally was heard in the U. S. Supreme Court this year. In La Chance v. Erickson (1998), the court compared this case to the criminal arena, noting that a “defendants right to testify does not include the right to commit perjury” (Lying employees, 1998).

The employee must take affirmative steps in presenting mitigating factors during an investigative interview. In City of Albuquerque v. Chavez (1997), a Fire Lieutenant was given adequate notice of a pre-termination hearing. He failed to bring forth personal facts that may have lessened his discipline. The court ruled that it is the employee's burden to present any facts in his own defense (Imposing burden, 1997).

DISCOVERABILITY/ACCESSIBILITY OF INVESTIGATIVE REPORTS

In general, employers are not required to provide investigative reports, notes, or minutes from meetings to employees. This includes background reports from previous employers (Ricciardi, 1998).

Confidential investigative files are, however, "discoverable" in litigation. This is codified in Nevada Revised Statutes 613.075 (1997).

Hagaman (1995), recommends making use of legal doctrine that can protect internal investigative reports from discovery. If the investigation is directed and supervised by an attorney, then the results of the investigation are protected by the attorney-client privilege. It is important to maintain all investigative files separately from ordinary personnel files. Personnel files are accessible to the employee on demand; if investigative files are part of the employee's personnel files they are not "protected" under the NRS (D. Shattler, personal communication, December,1997). Ricciardi (1998) agrees, and refers again to Nevada Revised Statute 613.075, which defines investigative files separate from personnel files as protected from employee access.

INTERVIEWS

Several interviews were conducted with Lieutenant David Shattler throughout the month of December, 1997. Lt. Shattler assisted the author in conducting a misconduct investigation based on a

citizen complaint. Lt. Shattler is an investigator with the City of Las Vegas Detention and Correction Services, and was previously employed with the Los Angeles Police Department.

The focus of the authors' efforts with Lt. Shattler was on the procedures involved in conducting the internal investigation. The Lieutenant provided the author with samples of the Detention Service's Policy on Internal Investigations, and samples of an extensive investigative report. Also discussed were the issues of the employee's obligation to assist in the course of the investigation. As is consistent with City policy elsewhere, officers with Detention and Corrections are obligated to respond when ordered to participate in an investigative interview.

Shattler stressed that the need for protecting confidentiality should be imposed on all parties, including the employee under investigation. Their Division uses a notification form, which is served on the Officer requested to respond to the interview. The form includes language enjoining the interviewee from discussing the subject matter of the interview with anyone other than their union representative. He also provided information on setting up the investigative files and records, and the importance of keeping investigative records separate from employee files.

An interview was conducted with Judy Tuttle on August 13, 1998. Ms. Tuttle is a management analyst for the City of Las Vegas Human Resources Division. Her previous experience includes nearly twenty years with IBM; she was Personnel Support Manager for the Western Region of that corporation.

The interview covered several topics related to union relations, employee rights and obligations, and documentation.

One issue that Tuttle stressed is the importance of professionalism in the investigative staff. Problems will be averted if the investigator and his/her staff are knowledgeable of the legalities and local

practices involved. Unions present challenges to the investigator and administration in general. They are increasingly aware of the legal principles, and also have access to the political channels within city government.

Tuttle rarely informs the local bargaining units of impending personnel problems until preliminary investigations reveal the scope and impact of the issue. Typically, no contact with union officials would be made unless it appears (after the preliminary phases of an incident investigation) that discipline for a covered employee may result.

An employee in the City of Las Vegas is obligated to comply when asked to participate in an investigative interview; failure to do so will result in charges of insubordination. Within the context of investigations (without threat of discipline) these interviews are normally conducted without a union representative present.

Tuttle does warn employees that confidentiality is required during the course of the investigation. The City is currently working on a notification form that the employee will be required to sign. The tentative language is:

> I understand that the Department of Human Resources is conducting a confidential inquiry relating to a personnel matter and that my assistance is required to complete the investigation. I also understand that it will become my obligation to maintain the confidentiality of information I share with the Human Resources staff…as well as information I may receive in the course of this investigation.

This language should also be included in the Personnel Policies and Procedures manual.

In terms of the City's duty to investigate, Tuttle acknowledges the subject and issues identified in the literature review as appropriate. She stresses thorough investigation of work-place violence as being critical.

Her closing point was to emphasize the importance of consistency. If the ultimate action goes to arbitration, Tuttle states that the procedures used in information gathering will be scrutinized for consistency as closely as the end results. Procedures must be established and followed carefully, with full documentation of all actions.

Two interviews were conducted with Mr. Brent Profaizer; on August 6 and August 13, 1998. Mr. Profaizer is the Employee and Organizational Services Manager for the City of Las Vegas. He has some fifteen years of experience in the areas of employee and labor relations, contract management, and organizational development. The author has worked with Mr. Profaizer on disciplinary related matters for several years, and has enjoyed the benefit of his knowledge and experience beyond the interviews reported here.

When asked what issue is paramount to internal investigations, Mr. Profaizer discussed the critical importance of an investigation being fair and objective. He pointed out a "7 rules" test that, in his experience, arbitrators rely heavily on in determining the appropriateness of discipline. Of those "7 rules", three refer directly to the investigative procedures. If the investigation is not fair and objective, the eventual discipline is built on a very weak foundation.

He stressed the need to interview thoroughly the defendant's corroborating witnesses. The essence of objectivity is to make an effort; to get all sides of the story. The internal investigators job isn't to make management's case, it is to find the facts and report them objectively.

Mr. Profaizer continually stressed good faith and common sense. Learning to listen effectively is an important skill for the investigator. Equally important is being able and willing to apply a fair and reasonable standard of evidence. When examining a person's actions and behavior, look for reasons someone would conceivably do the reported behaviors or actions. In other words, look for the "why" behind the actions people are reported to have done.

Mr. Profaizer maintains a high degree of cooperation with the local bargaining units, and involves them early on in many interviews. Typically, the representative is allowed to be a witness more than a participant. Mr. Profaizer stresses the need to control the interview.

Based on the recent seminar attended by both the author and Mr. Profaizer, the language in the employee handbook on sexual harassment is being expanded. It will speak to the organization's requirement to investigate. It will also point out employees' obligation to report such incidents to supervisors. He acknowledges the requirement to investigate the other areas listed in the literature review.

The Literature Review helps define the framework within which the organization must operate, and subsequent procedures will reflect these legal requirements. Clearly, the organization must recognize and comply with all requirements to initiate investigations. Just as clearly, the rights of public service employees must be recognized and respected. The case of Intlekofer v. Turnage (1992) demonstrates that liability can only be avoided by effective action; it is not enough to just make a token effort. The interviews with Shattler, Tuttle, and Profaizer offered three different perspectives on the issue of internal investigations. All three provided valuable insight, and their real world experience will aid in the development of policies and procedures for the Las Vegas Fire Department.

**PROCEDURES**

The goal of this research project was to determine legal principles underlying the process of conducting internal investigations. The evaluative research method was used to determine the current state of these legal principles and the procedures derived therefrom. The procedures used in this research project include the literature review, interviews with subject matter experts, personal participation in investigative interviews and attendance at three seminars directly related to the scope of the material researched.

The literature review included research at the Learning Resource Center at the National Emergency Training Center in February, 1998. Further research was conducted in the public library system of Clark County, Nevada. Extensive use was made of the author's departmental and personal library, as well as written materials/texts provided by associates and interviewees.

Interviews were conducted with Lieutenant David Shattler on several occasions in December, 1997. Lt. Shattler has an extensive background as a police officer and investigator. He currently conducts internal investigations for the City of Las Vegas.

Judy Tuttle, Management Analyst for the City of Las Vegas Human Resources, was interviewed on August 13, 1998. Her background and experience in Human Resources includes directing and conducting numerous investigations, particularly in the area of Title VII complaints.

Mr. Brent Profaizer, Employee and Organizational Services Manager for the City of Las Vegas Human Resources Division, was interviewed on August 6 and 13, 1998. His background and experience also directly relate to the subject of internal investigations, and he works closely with the local bargaining units in these matters.

The interviews focused on the research questions, as well as the following:

- What does the interviewee see as the biggest single issue in the investigative process?
- What challenges do the involvement of the local unions present?
- When would the interviewee (proactively) seek union involvement?
- Should employees be notified in advance of the subject matter of the investigation?

These interviews were rather "free-form". Attention was paid to the questions listed, but the subject matter experts were encouraged to expound on their wide range of experience, and they did so freely.

Three courses were attended by the author that relate directly to the scope of this research project.

On March 25, 1998; the author attended a one day course titled "Managing a Work Force in 1998". This seminar was presented by a group of attorneys and sponsored by the publication "The Nevada Law Letter". The relevant topics included changes in law regarding employer investigations, sexual harassment case law, hiring issues under the ADA, and strategies to avoid liability for sexual harassment.

On March 18, 1998, the author attended a one day course titled "How to Conduct an Internal Investigation." This course focused on all aspects of the internal investigation process including legal principles, interviewing witness, and preparatory steps for an investigation. It included case studies and sample policies. This course was developed by the Council on Education in Management, and taught by attorneys and personnel managers.

On July 30, 1998 the author attended a half day seminar dealing with the latest developments in sexual harassment. The course focused on the most recent Supreme Court decisions affecting the application of Title VII in the work place. Of particular interest was changes in employer tactics in

developing a defense to charges of harassment. Much of the discussion had a direct impact on principles underlying the investigation of sexual harassment cases.

The author has also had the opportunity to personally conduct one investigation into off-duty criminal behavior, assisted in an investigation into a Chief Officers off-duty misconduct, and has assisted in the background investigative interviews with some 50 prospective firefighter cadets.

LIMITATIONS

Several factors are significant in a discussion of limitations. One such issue is the narrow focus on legal issues involved. Hundreds of cases address the area of research examined; entire texts are written on firefighter rights alone. In preparing this paper, cases were selected on the basis of their importance to the underlying issue and to illustrate several aspects of each research issue.

It should also be noted that the law itself is not immutable; that decisions are constantly made that have an impact on the interpretation of statutes. As this paper is being written, two Title VII cases decided by the U. S. Supreme Court are now being evaluated for their legal impact. These cases, Ellerth v. Burlington Industries (1998) and Faragher v. Boca Raton (1998), are characterized by Hicks (1998) as having the potential to create fundamental changes in sexual harassment law.

Though this paper researches law and case results on the national level, the reader must realize that each appellate court has its own character. Decisions reached in the Ninth District (which covers Nevada) for instance, may be interpreted differently in other areas. The face of the court changes as well, with the changes in judges that occasionally occurs.

The focus of this research effort was to assist in the eventual formulation of policy for the Las Vegas Fire Department. Therefore, the references to State of Nevada law, City of Las Vegas Codes, local contracts, etc., are germane to this purpose. It is assumed and realized by the author that this

information may be of less value to the reader; hopefully, it is at least informative and may even provide some useful guidelines for those agencies who don't address these issues.

DEFINITIONS

**Arbitration** Out of court dispute settlement; using a third party to make a decision the parties agree to be bound to.

**Civil Law** Law that determines rights and duties between private persons. The branch of law dealing with non-criminal matters.

**Common Law** Law made by judge's decisions, when deciding a case not governed by other kinds of law.

**Common Law System** Originally developed in England. Earlier cases became precedents on which later court decisions were based.

**Damages** Monetary compensation awarded to one who has been injured by another's action.

**Discovery** A pretrial procedure in which one party has a right to disclosure of the other party's information concerning a case.

**Due Process** A constitutional guarantee requiring government to provide fair procedures before it deprives a person of life, liberty, or property.

**Liability** A legal obligation to do something or refrain from doing it.

**Malfeasance** The doing of an act that is wrong and unlawful.

**Misfeasance** Doing a lawful act in a wrongful manner. The proper performance of the act would have been lawful.

**Regulations** Laws made by an administrative agency; They have the status of law.

**Search and Seizure** A practice in which a person or place is searched and evidence is seized.

**Statute** A law enacted by the legislative branch of government.

**Subpoena** A order from a court compelling a person to appear in court or to produce material. Disobeying the subpoena is punishable as contempt of court.

**v** Versus, Latin for "against". Used in the title of cases between opposing parties, as in NLRB v. Weingarten.

## RESULTS

1. What circumstances would require the organization to initiate an investigation?

The literature review shows a number of legal requirements that spur internal investigations. On the Federal level, the Age Discrimination in Employment Act, the American with Disabilities Act, Title VII and OSHA carry mandates to conduct investigations under various circumstances. Title VII cases dealing with discrimination often prove to be the most expensive for employers to overlook. The body of law that has developed concerning sexual discrimination is particularly confusing and complicated (Hicks, 1998). In the seminar delivered by Hicks ("Implementing the new rules for sexual harassment") this point was illustrated by describing the impact of two recent U.S. Supreme Court cases that virtually rewrote the law of sexual harassment.

City of Las Vegas Municipal Code, established Policies and Procedures, and the Agreement between Local 1285 of the IAFF and the City of Las Vegas reflect the importance of these requirements, particularly in regard to Title VII.

The potential for civil liability drives the organization's need to conduct internal investigations as well. Case law reveals many instances of employer liability in issues like negligent hiring, retention and

supervision resulting from complaints that originate from within and outside the Department. Background investigations are performed by the City of Las Vegas prior to the hiring of all fire personnel. These investigations include the screening of criminal record data bases, and a pre-hire interview during which all discrepancies in applications, particularly in regard to work history, are explored one on one with the candidate.

While not an absolute requirement, the ethical imperative to manage effectively and in good faith provides a strong motivation to investigate fairly and appropriately when called for. As Curiale (1997) points out, fair treatment makes an essential statement about what an organization stands for.

2. What are an employee's personal rights in the course of an internal investigation?

The employee in the public sector typically enjoys due process rights, as guaranteed all American citizens under the 14th amendment to the U. S. Constitution.

The literature search noted conditions that apply to due process in the employment context. Non-tenured or probationary employees do not enjoy due process protection; the City's Agreement with Local 1285 of the IAFF has language consistent with this position.

Public employees' privacy rights are also an issue. Under the 4th Amendment, the right of government agencies in regard to search and seizure of property is strictly defined and limited. Public employees in the workplace have a more limited expectation of privacy. City of Las Vegas policies clearly emphasize the right of the employer to have free access to offices, files, and other workplace areas.

The privacy issue extends to polygraphic examination. Nevada Revised Statute 613.440-613.510 inclusive (1989) protects public employees in Nevada from having to submit to "lie detector" testing. Similar language exists in the CBA for covered Las Vegas Fire Department members.

Employees have a right to be free from defamation by their employers. Awareness of defamation by investigative personnel is an additional impetus to maintain confidentiality. Even communications limited to within the organization can be ruled defamatory in nature (Zucker, 1998).

Employees in an organized workplace have the right to union representation in any interview that may lead to discipline (Aitcheson, 1997). This was defined by the so-called Weingarten rule, based on the case NLRB v. J. Weingarten (1975).

Employees required to participate in an internal investigation are protected from criminal self incrimination by the Garrity rule. Under Garrity, the employee ordered to respond to an interview is protected from self-incrimination in subsequent criminal proceedings. Also, the employer must limit questioning to areas specifically and directly related to the employee's duties or fitness for duty.

3. What are the employees obligations in the course of an investigation?

An interpretation of the Garrity rule mentioned above holds that, within the scope of employment related issues, employees are obligated to participate in investigative interviews. They are also obligated to tell the truth during the course of an interview (Lying employees, 1998). Employees also have to present mitigating facts in their defense, if such facts exist. The employer is not obligated to defend the employee (Imposing burden, 1997)

4. Are the results of the internal investigation accessible to the employee?)

Like all legal issues, the answer is a clear yes and no. As Shattler stated, if investigative files are kept separate from other personnel files, they are not accessible to the employee on demand (personal communication, December, 1997). They are, however, discoverable by subpoena in the event of arbitration or trial (Ricciardi, 1998).

**DISCUSSION**

Any investigative procedure to be developed and implemented must be based on sound legal principles, and must take into account the rights of members affected. As Hicks (1998) stated in a seminar on sexual harassment law, the issues are complicated. The body of law evolves as well, changing with the passage of time and the character of the courts themselves.

There are, however, some consistent findings that can be gleaned from case law, procedures already in use, and information from experts in the field. Individual rights must be respected. In order to successfully enforce workplace standards, personal actions, both on and off duty, can be investigated and acted upon, but such disciplinary actions will be struck down if individual rights are trod upon in the process (How to conduct, 1998).

Profaizer (personal communication, August 13, 1998), stresses good faith motivation and professionalism as cornerstones to the organizations actions. If a good faith effort is made to investigate where warranted, if confidentiality is maintained, and if careful documentation is routine and consistent, the organization can stand by its actions with confidence. The seminar of March 18 by the Council on Education in management and cases cited relating to individual rights in the literature review support Profaizer's contention in this regard.

Procedures should be open to review. While the results of investigations are confidential, the process used should be a matter of record. Clear disciplinary practices, published and available to all employees, alleviate anxiety and suspicion when an investigation is warranted (Curiale & Hirschfeld, 1997).

Above all, all parties interviewed stress the need to respect personal privacy and maintain confidentiality throughout the process. Shattler (personal communication, December, 1997) goes so far as to require that those interviewed restrict sharing of information to their legal representatives until the investigation is closed.

The eventual formulation of a departmental investigative policy will draw heavily on the information derived from this study. The focus on due process, confidentiality, and respect for the good name and character of others will be reflected in those procedures.

The elements of an effective internal investigative policy are in many cases extant in assorted directives, ordinances, and procedures throughout the city. It is vital that the Department incorporate all these disparate elements into one seamless document. It should incorporate language concerning Title VII, privacy and searches, confidentiality, and the other issues noted in this report. Attention must be paid to address those issues subject to bargaining with the Local affiliate of the IAFF. Profaizer's (personal communications, August 13, 1998), approach to early involvement of the Local would be advisable in the formulation of this policy, as many of the issues covered impact already negotiated rules and regulations.

**RECOMMENDATIONS**

To avoid possible liability for negligent hiring, background investigations of all employees should be done prior to hire. All questionnaires and forms used in this process should be completely filled out; all discrepancies in employment history must be thoroughly investigated. Obviously, instances of illegal activity, arrests, etc. must be investigated as well. Interviews should be conducted and all actions taken in conjunction with the background check must be documented.

The issue of privacy rights in search and seizure can be addressed by having clear and appropriate language within employee handbooks or policy manuals. The employee should understand clearly that their expectation of privacy in the workplace is limited, and documentation of that notice and warning should be distributed to all employees. The other defense to workplace privacy issues is to get consent to such searches. This is a weak alternative to having a clearly published policy.

Any investigative procedures developed should be done with a thorough understanding of due process and the ramifications of the Garrity and Gardner cases.

Ensure that the employee Policies and Procedures manual contain the complete city policy on Title VII.

Implement a means of documenting the "confidentiality" warning for all employees being interviewed. Employees must understand that the course and scope of the interview, if discussed with others, could impact a fellow employee's right to privacy.

Ensure that staff assigned to conduct investigations are competent and professional. Training of all such personnel must be thorough and should be documented. This training should emphasize the awareness of events and issues that should "trigger" an internal investigation. The importance of Title VII is fairly well known, violations of OSHA or threats of workplace violence are less obvious issues

that must not be overlooked. A confidentiality warning, similar to that proposed herein, should be approved by the legal department and used in the course of all interviews.

Training for investigative staff should focus heavily on the need for objectivity. A fair search for the truth is the only appropriate motivation in the investigator.

The Department should maintain an open and proactive approach to local union involvement, both in policy formulation and in employee representation.

All internal investigative files should be maintained separately from other personnel files, otherwise they are accessible on demand by the employee.

## REFERENCES

Aitchison, W. (1997). The rights of firefighters. Portland, OR: The Labor Relations Information System.

City of Las Vegas. (1997). An agreement between the City of Las Vegas and the International Association of Firefighters, Local 1285. Las Vegas, NV: Author.

City of Las Vegas. (1992). Civil service rules. Las Vegas, NV: Author.

City of Las Vegas. (1997). Personnel policies manual. Las Vegas, NV: Author.

Curiale, R. J., & Hirschfeld, S. J. (1997). Conducting internal investigations. San Francisco: Curiale, Dellaverson, Hirschfeld, Kelly, and Kraemer.

Defaming without speaking…your actions may speak louder than your words. (1995, May). The Iowa Employment Law Letter, 1, 5-6.

Demaree, L. S. (1995, June). Invasion of privacy and defamation in the employment context. The Nevada Labor Letter, 3, 6-8.

Disciplinary action and termination of public employees. (1997). Data Research, Inc. Special Reports, 1-2.

Doran, J. A. (1996, July). 9 & ½tips—controlling your employment litigation exposure. The Nevada Labor Letter, 4, 6-7.

Fired county employees provided with adequate hearings. (1995, June). The Nevada Labor Letter, 3, 9.

Fitzwilliam, J. F. (1997). Winning strategies for fire department management (S. Federico, Ed.). Boston: Quinlan.

Hagaman, D. C. (1995, June). Protecting the confidentiality of investigative materials. The Georgia Employment Law Letter, 55-56.

Hicks, P. H., & Hall, V. A. (1998, July). Implementing the new rules for sexual harassment. (Available from Hicks and Walt, 3930 Howard Hughes Parkway #150, Las Vegas, NV 89109).

Hogan, L. J. (1995). Legal aspects of the fire service (I. M. Hogan, Ed.).Frederick, MD. Amlex.

How to conduct an internal investigation (2nd ed.). (1998). Walnut Creek, CA: Council on Education in Management.

Imposing burden of production and persuasion on employee in pretermination hearing does not violate due process. (1997, November). Public Employment Law Report, 5, 7.

Las Vegas Fire and Rescue. (1998). Positive discipline manual. Las Vegas, NV: Author.

Las Vegas Municipal Code, 2.56.010, (Ord. 2218-1, 1981).

Lying employees may be punished. (1998, March). The Nevada Labor Letter, 6, 9.

Moore, H. L. (1998, April). Eight steps to a sexual harassment free workplace. Training & Development, 52, 12-13.

Morgando, M. L. (1994). What you don't know about sexual harassment. In Personnel Law Update 1994 (pp. B7-8). Walnut Creek, CA: Borgman Associates.

Moss, G. C. (1995, February). Effective employee investigations and background checks. The Nevada Labor Letter, 3, 6-9.

Officer entitled to union representation during meeting with sheriff. (1998, February). Public Employment Law Report, 5, 5-6.

Preventing an employer's nightmare—background checks. (1997, July). The Nevada Labor Letter, 5, 2.

Racially motivated discharge violates due process and equal protection. (1998, February). Public Employment Law Report, 5, 6-7

Requiring memorandum in disciplinary investigation without union representation constitutes an unfair labor practice. (1997, August). Public Employment Law Report, 5, 5.

Ricciardi, M. J. (1998, January). 1997 Nevada legislative changes—an employers' summary. The Nevada Labor Letter, 6, 6-9.

Rosetti, C. J. (1998, Summer). Conducting a fraud investigation: the basics. Transmission, 16, 1-7.

Search of employee's desk and files held to be reasonable. (1998, March). Public Employment Law Report, 5, 5.

Squyres, B. N., Brailsford, A., Dockstader, K., Bowman, S., Ellers, D., Wiskirchen, B. (1996). Employers can avoid OSHA's "egregious" penalties. The Idaho Employment Law Letter, 1, 6-8.

United States Supreme Court employment cases (3rd ed.). (1997). Rosemount, MN: Data Research.

Zucker, C. D. (1998). Strategies to avoid liability for sexual harassment as we move to the 21st century. In J. L. Beachboard (Ed.), Managing a workforce in 1998 (pp.54-55). Las Vegas, NV: The Nevada Labor Letter.